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II.

REPORT OF COMMITTEE APPOINTED TO MEMORIALIZE
THE LEGISLATURE OF THE STATE OF MASSACHU-
SETTS ON THE SUBJECT OF EXPERT TESTIMONY.

Read, Oct. 14, 1873.

YOUR Committee, who had in charge the duty of presenting to the Legislature the importance of some legislative action upon the subject of employing the testimony of the class of witnesses known as experts in the trials of causes in courts, respectfully report.

The Chairman received a notice from "the Committee on the Judiciary on the part of the House" that they would "give a hearing to parties interested in an order relative to medical testimony in criminal cases," on the 28th day of March last. And although the order, in its terms, was more limited in its scope than the subject with which your Committee deemed themselves to be charged, the Chairman attended at the time appointed, and endeavored to present what was believed to be the views of the Academy upon the general subject of expert testimony, with the reasons why, in their judgment, some efficient measures of reform in respect to this was important and desirable.

These views were listened to by the Committee with great courtesy and apparent attention. To aid them in understanding the purposes at which the Academy aimed, as well as to suggest some of the means by which, in their judgment, these purposes might be attained, the draft of a bill or legislative act was laid before them, which had been submitted for consideration to able and discreet jurists, and others of acknowledged sagacity, as well as several members of the Academy, and had been by them approved. Of this the Committee were fully apprised; as well as of the fact that, in what they were doing upon this subject, the Academy were acting in harmony with three other associations of gentlemen interested in science, — viz., The Suffolk District Medical Society, The Boston Society for Medical Observation, and The Boston Society for Medical Science, — and that the attention of these Associations had been specially called to the subject of expert testimony, by more or less of their members having been required to give such testimony in matters of scientific inquiry and investigation.

It was urged, too, before the Committee, that it was obviously ungenerous, as well as unjust, at the same time that it tended to bring the administration of justice into contempt, to compel honest and honorable experts, who had made themselves masters of any science by study, observation, and experience, to put themselves in conflict in open court upon, so far as the public saw, terms of equality with pretenders, who were willing to lend themselves, and the science to which they pretended, for hire, to promote the views or interests of their employers. And this, too, when the comparative claims of the two to confidence and respect were to be passed upon and determined by jurors drawn from the various walks and pursuits of life, untrained and uninformed in the matters upon which they are called to judge. Instances were cited and enumerated from both English and American courts, where juries have been subjected to such a discrimination, while the lives of persons upon trial depended upon the hap-hazard result to which they might come in trying to distinguish between what was true and false in science.

Whether and how far these suggestions were deemed worthy of thought or attention, your Committee have no means of judging. The first and only communication with which they have been favored by the Committee of the Judiciary was a brief note, bearing date May 24th, which simply announced that "the Committee do not see their way clear to reporting favorably upon the accompanying bill." This refers to the original draft of the bill, which had been left with them, and accompanied the note. The note contained no reasons for the result at which the Committee had arrived, nor how far, if at all, the scheme found favor with them.

If the bill was objectionable in any of its terms or details, it is much to be regretted that it did not occur to the Committee that these might easily be modified or wholly changed, inasmuch as the bill, as offered, was merely by the way of suggestion, and might, without objection, have been wholly changed in its form, if it could any better express the views of the Committee.

If the brevity of the session, or the period of two months during which the Committee held the matter in their hands, was inadequate to the forming of a satisfactory conclusion upon the subject submitted to them, it ought to be regarded as a public misfortune. If, on the contrary, it was the deliberate judgment of that Committee that the course of justice is better served, and the honor of our courts more effectually advanced, by such exhibitions of trumped-up testimony and pretended skill and science as have, at times, signalized what are called

judicial trials, than would be likely to be done by any proposed reform which they were asked to inaugurate, it might perhaps lead the Academy to believe that the public mind is not yet sufficiently awakened to the importance of providing a remedy for an existing crying evil, and thereby stimulate them to a still further effort to convince others of the necessity of some action in the premises.

As things stand, they ought not to let the matter rest in silence. The mischief at which they aim is becoming more glaring every year, and public attention in various quarters is being called to it in a significant manner, both in England and our own country. Nor is it wise to suffer this interest to subside, until some remedy has been devised, or is found impracticable.

Had the Committee on the Judiciary seen fit to favor the Academy with their views upon the matter, it might have aided its members in forming a judgment as to the course they ought to pursue. In the absence of these, however, your Committee have thought proper to accompany their report by the draft of the bill before mentioned, that, if the Academy should hereafter see fit to take any further action upon the matter, it might serve, by way of suggestion, to point out the objects which are aimed at by them.

In conclusion, your Committee cannot but express a hope that the attempt to interest the Legislature in the subject now under consideration, which has been twice repeated, will be renewed and reiterated till associations as numerous and respectable as those who have here undertaken to speak in behalf of the cause of science and truth, in which they have a personal but no pecuniary interest, may hope to obtain a response from those to whom their appeal is addressed, which will sustain them in their endeavors to accomplish a public benefit, or show wherein they are mistaken in what the public needs. Nor are they willing to doubt that, in due time, a community so ready as ours is to boast of its schools, its colleges, and its institutes of science, will devise some way by which, in the investigations of scientific truths in judicial trials, the value, together with the honor and dignity, of science, as well as truth, may be vindicated and sustained.

AN ACT CONCERNING THE TESTIMONY OF EXPERTS.

Be it enacted, &c., as follows :

SECTION 1. Whenever the District Attorney of any district in the Commonwealth, or the Attorney-General, shall be informed of the death of any person in such district, and that there is reasonable cause to suspect that the same is a case of homicide, and he shall be of opinion that

it is proper to cause a scientific investigation to be made into the causes and circumstances of such death, it shall be his duty forthwith to apply to one or more of the justices of the Supreme Judicial Court to appoint one or more discreet and experienced experts, who shall be deemed to be competent to conduct such investigation, and to form a conclusion upon the questions involved therein. And said justice or justices shall thereupon select and appoint such expert or experts accordingly. The compensation which shall be adjudged reasonable by the Court for the services of such experts, together with the costs of making such investigation, shall be allowed and paid in the same manner as other costs in criminal proceedings.

SECTION 2. If, in the trial of any issue in any of the courts of the Commonwealth, the presiding judge shall be of opinion that the testimony of one or more expert witnesses, versed in matters of skill or science, a knowledge of which is material to a satisfactory determination of such issue, may be useful or important in such trial, it shall be competent for such judge, upon the application of either party to such issue, and after a hearing of such parties, if they shall desire it, to select and appoint one or more such expert witnesses, and to require their attendance to give testimony in such trial. And the witnesses so selected and appointed shall attend and be examined in the same manner as other and ordinary witnesses, when testifying in the trial of such issues. The court shall allow such witnesses, for their services and attendance in such trial, such sum as may be adjudged reasonable, to be advanced and paid as is provided in respect to the fees of ordinary witnesses. And the sums so advanced and paid by either party, if prevailing in the suit, shall be charged by and allowed to him as a part of his costs, as in the case of other witnesses, unless the court for good cause shall order otherwise.

SECTION 3. Neither party shall be entitled to claim a delay or continuance of any trial, for the purpose of calling in the testimony of expert witnesses, unless the court shall be satisfied that there has been no unreasonable delay in making application for such appointment.